

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MELVIN VANOVER,

Defendant-Appellant.

UNPUBLISHED

February 5, 2009

No. 280431

Wayne Circuit Court

LC No. 07-004525-01

Before: Cavanagh, P.J., and Jansen and Meter, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529, and was sentenced as a fourth-offense habitual offender, MCL 769.12, to five to twenty years' imprisonment. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On September 23, 2006, defendant robbed the female victim in the parking lot of a Farmer Jack's grocery store in Dearborn Heights. The victim observed something silver in defendant's right hand; she believed it was a gun. Defendant ran away with the victim's purse and keys. She briefly followed him before calling the police. A police officer dispatched to the scene located defendant a relatively short time later in the darkened restroom of a used-car building. Defendant's clothing matched that of the perpetrator. The police officer searched the restroom and found a wrench between the trashcan and the wall. Defendant was transported back to Farmer Jack's, where the victim immediately identified him as her assailant.

Defendant first argues on appeal that he was denied the effective assistance of counsel because trial counsel advised him that, if he testified, the prosecution would likely impeach him using his criminal-conviction record.

Defendant failed to move for a new trial or an evidentiary hearing concerning his claims of ineffective assistance of counsel; therefore, our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 95 (2002).¹

¹ A panel of this Court previously denied defendant's motion for a remand to develop a trial-court record, and we decline to revisit that decision.

Whether a defendant was denied effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review the trial court's factual findings for clear error and review its constitutional determinations de novo. *Id.* A finding is clearly erroneous if a definite and firm conviction is left that a mistake has been made. *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 326-327; 521 NW2d 797 (1994). To overcome this presumption, the defendant must satisfy a two-pronged test. The defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Second, the defendant must show that the deficiency was so prejudicial that there is a reasonable probability that, but for counsel's unprofessional errors, the trial outcome would have been different. *Id.* at 302-303.

A defendant must overcome the strong presumption that counsel's actions constituted sound trial strategy. *Id.* at 302. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, which this Court will not review with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

A witness's credibility may be impeached with evidence of prior convictions, if the convictions satisfy the criteria set forth in MRE 609. MCL 600.2159; *People v Cross*, 202 Mich App 138, 146; 508 NW2d 144 (1993). Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction, or of the release of the witness from the confinement imposed for that conviction, whichever is the later date. MRE 609(c). A period of more than 10 years elapsed since the date of defendant's last conviction and also from the confinement imposed for that conviction. Thus, evidence of defendant's previous convictions was not admissible under MRE 609.

However, it remained within the trial court's discretion to admit, at any time during the course of the trial, evidence of prior convictions, notwithstanding a ruling to exclude such evidence under MRE 609, if it was offered for some proper purpose other than to impeach defendant's credibility in general. *People v Taylor*, 422 Mich 407, 414-415; 373 NW2d 579 (1985). For instance, if defendant had testified regarding his peaceful nature, he may have opened the door to cross-examination about his prior convictions. See, generally, *People v Lukity*, 460 Mich 484, 498-499; 596 NW2d 607 (1999) (discussing "opening the door" to cross-examination). Defense counsel may have discouraged defendant from testifying as a matter of trial strategy to prevent the possibility that he would open the door to his prior convictions. We will not review questions of trial strategy with the benefit of hindsight. *Dixon, supra* at 398. Due to the lack of a trial record regarding defense counsel's reasons for not calling defendant as a witness and the high likelihood that counsel refused to call him for strategic reasons, we find no ineffective assistance of counsel.

In addition, defendant's claim that his counsel should have moved to suppress his past convictions under MRE 609 is without merit. Defendant's past convictions were not admissible

for impeachment purposes under MRE 609; therefore, any motion would have been futile. A claim of ineffective assistance of counsel cannot be based upon a failure to make a frivolous motion. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Defendant next argues that the sentencing court erred in scoring 10 points for Offense Variable (OV) 4.² Even assuming the court erred in scoring OV 4, defendant is not entitled to resentencing because that OV, if scored as 0 points, would not have changed the guidelines recommended range. *People v Francisco*, 474 Mich 82; 711 NW2d 41 (2006); *People v Davis*, 468 Mich 77, 83, 89 n 8; 658 NW2d 800 (2003).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Patrick M. Meter

² OV 4 is to be scored 10 points where the victim suffered serious psychological injury that may require professional treatment, and “the fact that treatment has not been sought is not conclusive.” MCL 777.34(2).